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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ARCELI HIDALGO,

12 Plaintiff,

13 vs.

14 AURORA LOAN SERVICES LLC;
15 TFLG, a law corporation; ERIC G.
16 FERNANDEZ; S. EDWARD
17 SLABACH; SEAN H. VEDROSIAN;
VIANA G. BARBU; and DOES 1
through 50, inclusive.

18 Defendants.
19

CASE NO. 13-CV-1341-H
(JMA)

**ORDER GRANTING
MOTION TO DISMISS WITH
LEAVE TO AMEND
COMPLAINT AND RE-
SERVE**

20 On July 2, 2013, Defendants TFLG, A Law Corporation, Eric G. Fernandez, S.
21 Edward Slabach, Sean H Vedrosian, and Viana G. Barbu (“TFLG”) filed a motion to
22 dismiss Plaintiff Hidalgo’s complaint for failure to state a claim. (Doc. No. 6.) On July
23 30, 2013, Defendant Aurora Loan Services LLC (“Aurora”) made a special appearance
24 to file a motion to dismiss Plaintiff’s complaint for insufficient service of process. (Doc.
25 No. 12.) On August 28, 2013, the Court submitted the motion on the papers. (Doc. No.
26 14). To date, Plaintiff has yet to file an opposition to Defendants’ motions. For the
27 reasons below, the Court **GRANTS** Defendants’ motions to dismiss without prejudice.
28

Background

On November 1, 2005, Plaintiff obtained a home mortgage loan from First National Bank of Arizona (“Bank of Arizona”) pledging as security property located at 15751 Lofty Trail Drive, San Diego, California. (Doc. No. 1 (“Compl.”) ¶¶16, 19, 20.) The deed of trust listed the Bank of Arizona as the lender and MERS Inc. as beneficiary. (*Id.* ¶19.) In February 2011, Defendant Aurora Loan Services LLC (“Aurora”) received Plaintiff’s loan by assignment from the Bank of Arizona. (*Id.* ¶21.)

In December 2012, Aurora, through their counsel, Defendant TFLG, initiated an unlawful detainer action against Plaintiff in California Superior Court in San Diego County. (*Id.* ¶51.) The Superior Court issued judgment in favor of Aurora on May 30, 2013. (Doc. No. 3, Ex. A at p. 4.) Defendants obtained a writ of execution authorizing the Sheriff or Marshal of the County of San Diego to enforce the judgment. (*Id.*) The Sheriff served Plaintiff with a notice to vacate by June 13, 2013. (*Id.*, Ex. A at p. 1.)¹

On June 10, 2013, Plaintiff, proceeding pro se, filed a complaint in this Court for damages for violations of the Real Estate Settlement Practices Act (“RESPA”), 12 U.S.C. § 2605; for violations of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1641; for violations of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692; and common law claims of lack of standing to foreclose; fraud in the

¹ The Court takes judicial notice under Federal Rule of Evidence 201, of the following publicly recorded documents: Verified Complaint for Unlawful Detainer filed on December 26, 2012 in San Diego County Superior Court Case No. 37-2012-00048326 (Doc. No. 6-2, RJN Ex. 1); Deed of Trust executed on November 1, 2005 and recorded on November 9, 2005 in the official records of San Diego County as Document No. 2005-0975384 (*Id.* Ex. 2); Assignment of Deed of Trust dated February 15th, 2011 and recorded on February 22, 2011 in the official records of San Diego County as Document No. 11-971120 (*Id.* Ex. 3); Trustee’s Deed Upon Sale dated September 10, 2012 and recorded on September 13, 2012 in the official records of San Diego County as Document No. 2012-0552078. (*Id.* Ex. 4.) See *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (“[U]nder Fed. R. Evid. 201, a court may take judicial notice of ‘matters of public record.’”).

1 inducement; fraud in the concealment; and for declaratory and injunctive relief.²
2 (Compl.) On June 20, 2013, Plaintiff filed an ex parte application for a TRO to stay
3 the eviction and to prevent Defendants from taking possession of the property.
4 (Doc. No. 3.) The Court denied the Plaintiff's request for a TRO after concluding
5 that the Plaintiff failed to show a "fair chance of success on the merits." (Doc. No. 5
6 at p. 5.) On July 2, 2013, Defendant TFLG filed a motion to dismiss Plaintiff's
7 complaint for failure to state a claim for which relief may be granted. On July 30,
8 2013, Defendant Aurora filed a motion to dismiss Plaintiff's complaint for
9 insufficient service of process.

10 Discussion

11 **I. Defendant TFLG's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)**

12 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the
13 pleadings and allows a court to dismiss a complaint upon a finding that the plaintiff
14 has failed to state a claim upon which relief may be granted. See Navarro v. Block,
15 250 F.3d 729, 732 (9th Cir. 2001). Federal Rule of Civil Procedure 8(a)(2) requires
16 that a pleading stating a claim for relief contain "a short and plain statement of the
17 claim showing that the pleader is entitled to relief." The function of this pleading
18 requirement is to "give the defendant fair notice of what the . . . claim is and the
19 grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
20 (2007).

21 The court may dismiss a complaint as a matter of law for: (1) "lack of
22 cognizable legal theory," or (2) "insufficient facts under a cognizable legal claim."
23 SmileCare Dental Grp. v. Delta Dental Plan of Cal., 88 F.3d 780, 783 (9th Cir. 1996)
24 (citation omitted). However, a complaint survives a motion to dismiss if it contains
25 "enough facts to state a claim to relief that is plausible on its face." Twombly, 550
26

27 ²Plaintiff also lists claims for intentional infliction of emotional distress, quiet title, and
28 rescission, but Plaintiff does not plead or mention these claims in the body of the complaint.
(See Compl.)

1 U.S. at 570. Nevertheless, the reviewing court need not accept “legal conclusions”
2 as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). “Factual allegations must be
3 enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at
4 555. It is also improper for the court to assume “the [plaintiff] can prove facts that
5 [he or she] has not alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State
6 Council of Carpenters, 459 U.S. 519, 526 (1983). On the other hand, “[w]hen there
7 are well-pleaded factual allegations, a court should assume their veracity and then
8 determine whether they plausibly give rise to an entitlement to relief.” Iqbal, 556
9 U.S. at 679. In deciding a motion to dismiss, the court only reviews the contents of
10 the complaint, accepting all factual allegations as true, and drawing all reasonable
11 inferences in favor of the nonmoving party. al-Kidd v. Ashcroft, 580 F.3d 949, 956
12 (9th Cir. 2009) (citations omitted).

13 **A. Plaintiff’s Federal Claims**

14 **I. RESPA**

15 Plaintiff alleges that Defendant TFLG violated the Real Estate Settlement and
16 Procedures ACT (“RESPA”), 12 U.S.C. § 2605. (Compl. ¶¶57-58.) Under RESPA,
17 the servicer of a loan has obligations to make a disclosure to the borrower relating to
18 assignment, sale, or transfer of loan servicing. 12 U.S.C. § 2605(a)-(b). The servicer
19 also has an obligation to respond to borrower inquiries. 12 U.S.C. § 2605(e). For
20 each of these provisions, 12 U.S.C. § 2605(f) imposes liability on servicers that
21 violate RESPA and fail to make the required disclosures. The section provides that
22 “[w]hoever fails to comply with any provision of this section shall be liable to the
23 borrower for each such failure” 12 U.S.C. § 2605(f)(1).

24 RESPA defines the term “servicer” as “the person responsible for servicing of
25 a loan (including the person who makes or holds a loan if such person also services
26 the loan).” 12 U.S.C. § 2605(i)(2). RESPA defines the term “servicing” as
27 “receiving any scheduled periodic payments from a borrower pursuant to the terms
28 of any loan, including amounts for escrow accounts described in [12 U.S.C. § 2609],

1 and making payments of principal and interest and such other payments with respect
2 to the amounts received from the borrower as may be required pursuant to the terms
3 of the loan.” 12 U.S.C. § 2605(i)(3).

4 In its motion to dismiss, Defendant TFLG asserts that TFLG does not qualify
5 as a servicer subject to RESPA. (Doc. No. 6-1 at p. 5.) Plaintiff’s complaint does not
6 allege that TFLG demanded or received payments from Plaintiff regarding any loan,
7 or allege any conduct on the part of TFLG other than its representation of Aurora
8 and Nationstar Mortgage LLC (“Nationstar”) in an unlawful detainer action.

9 Plaintiff’s complaint does not allege wrongful action by TFLG as a servicer
10 with sufficient facts to give rise to a cognizable claim under RESPA. Accordingly,
11 the Court GRANTS Defendant TFLG’s motion to dismiss with respect to Plaintiff’s
12 RESPA claim.

13 ii. TILA

14 Plaintiff alleges that Defendant TFLG violated the Truth in Lending Act
15 (“TILA”), 15 U.S.C. § 1641(g) by failing to notify the plaintiff of the transfer of
16 Plaintiff’s mortgage loan. (Compl. ¶¶55, 59.) TILA seeks to protect credit
17 consumers by mandating “meaningful disclosure of credit terms.” 15 U.S.C.
18 §1601(a). TILA requires that within thirty days of any sale or transfer of a mortgage
19 loan, the creditor that is the new owner or assignee of the debt must notify the
20 borrower in writing. 15 U.S.C. § 1641(g). The Plaintiff’s complaint alleges that the
21 Plaintiff was never notified of transfer or assignment of the mortgage. (Compl. ¶55.)

22 In response, Defendant TFLG asserts it was not acting as a “creditor” as that
23 term is defined under TILA. (Doc. No. 6-1 at p. 6.) The statute defines a “creditor”
24 as “a person who both (1) regularly extends . . . consumer credit which is payable by
25 agreement . . . , and (2) is the person to whom the debt arising from the consumer
26 credit transaction is initially payable” 15 U.S.C. § 1602(g). “An action under
27 1641(g) can only be brought against creditors or their assignees.” Rider v. HSBC
28 Mortgage Corp. (USA), 2:12-CV-925, 2013 WL 3901519 at *3 (S.D. Ohio July 29,

2013); see also Mourad v. Homeward Residential, Inc., No. 12–1880, 2013 WL 870205 at *4 (6th Cir. Mar. 8, 2013).

Plaintiff’s complaint does not show that TFLG holds or ever held an interest in the note or the Deed of Trust. (Doc. No. 6-2, RJN Ex. 2-4.) Furthermore, Defendant TFLG demonstrates that the debt secured by the Deed of Trust was foreclosed prior to TFLG’s involvement in the unlawful detainer action. (Doc. No. 6-2, RJN Ex. 1. at p. 15.)

The Plaintiff’s complaint fails to demonstrate that Defendant TFLG acted as a creditor under the definition section of TILA. 15 U.S.C. § 1602(g). Since TFLG did not extend credit to plaintiff or become the owner or assignee of Plaintiff’s mortgage loan, Defendant TFLG could not have had any obligations to Plaintiff under TILA. Therefore, the Court GRANTS TFLG’s motion to dismiss with respect to Plaintiff’s TILA claim.

iii. FDCPA

Plaintiff’s complaint alleges numerous violations of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 *et seq.*, by Defendant TFLG related to Plaintiff’s foreclosed residential mortgage. (Compl. ¶¶64.)³ “To be held liable for violation of the FDCPA, a defendant must-as a threshold requirement-fall within the Act’s definition of ‘debt collector.’” Izenberg v. ETS Services, LLC, 589 F. Supp. 2d 1193, 1198 (C.D. Cal. 2008) (citing Heintz v. Jenkins, 514 U.S. 291, 294 (1995)); but cf. Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 376 (4th Cir. 2006) (“Wilson’s ‘debt’ remained a ‘debt’ even after foreclosure proceedings commenced.”). The FDCPA defines “debt collector” as one who collects consumer debts owed to another. 15 U.S.C. § 1692(a)(6)(A).

However, an unlawful detainer action regarding holdover occupants after foreclosure does not qualify as the collection of a debt within the meaning of the

³The paragraphs in the complaint are not chronologically numbered following paragraph 59. Paragraph 64 referenced above is paragraph 33 on page 17 of the complaint.

1 FDCPA. See Cook v. Hamrick, 278 F. Supp. 2d 1202, 1205 (D. Co. 2003) (ruling
2 that unlawful detainer is a non-collection action under the FDCPA); see also
3 Monreal v. GMAC Mortgage, LLC, 13CV743 AJB NLS, 2013 WL 2444165 (S.D.
4 Cal. June 4, 2013) (dismissing FDCPA claim because plaintiff failed to specifically
5 allege facts indicating that any of the defendants were “debt collectors” as defined
6 under the FDCPA).

7 Plaintiff’s complaint has not properly alleged facts that the FDCPA applies to
8 Defendant TFLG as a debt collector. Accordingly, the Court GRANTS TFLG’s
9 motion to dismiss with respect to Plaintiff’s FDCPA claim.

10 **B. Plaintiff’s Remaining State Law Claims**

11 Plaintiff’s complaint also alleges that the Defendants are liable for damages
12 based on unlawful foreclosure; fraud in the inducement; and fraud in the
13 concealment.

14 i. Plaintiff’s challenge of foreclosure claim

15 The entirety of Plaintiff’s complaint alleges that Defendants acquired their
16 purported right to foreclose via an unlawful transfer from a trust of pooled
17 mortgages and through robo-signing. (See generally Compl. ¶¶19-56.) Yet, courts
18 have consistently concluded that borrowers cannot challenge an allegedly fraudulent
19 assignment of a deed of trust or an appointment of a successor trustee “because a
20 borrower is neither a party to nor an intended beneficiary of the challenged
21 agreements.” Brodie v. Northwest Trustee Services, Inc., Case No. 12-469, 2012
22 WL 6192723 at *2 (E.D. Wash. Dec. 12, 2012); In re MERS Litigation, Case No.
23 10-1547, 2012 WL 932625 at *3 (D. Ariz. Mar. 20, 2012); Javaheri v. JP Morgan
24 Chase Bank, N.A., Case No. 10-8185, 2012 WL 3426278 at *6 (C.D. Cal. Aug. 13,
25 2012). Additionally, Plaintiff’s claim that Defendants could not lawfully foreclose
26 is discredited by the California Superior Court’s issuance of a writ of execution to
27 Defendants authorizing the eviction of Plaintiff from the property. (Doc. No. 3, Ex.
28 A at p. 4.) Finally, Plaintiff’s complaint does not allege any action by Defendant

1 TFLG (the law firm that performed the unlawful detainer action) until after the
2 foreclosure was completed.

3 ii. Fraud in the inducement and fraud in the concealment

4 Plaintiff brings causes of action for fraud in the inducement and fraud in the
5 concealment against Defendant TFLG. (Compl. ¶¶13-14.) Under California law,
6 “[t]he elements of intentional misrepresentation, or actual fraud, are: ‘(1)
7 misrepresentation (false representation, concealment, or nondisclosure); (2)
8 knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4)
9 justifiable reliance; and (5) resulting damage.’” Anderson v. Deloitte & Touche, 56
10 Cal. App. 4th 1468, 1474 (1997). The elements of fraud in inducement of a contract
11 are the same elements as actual fraud. See Zinn v. Ex-Cell-O Corp., 148 Cal. App.
12 2d 56, 68 (1957).

13 Under Federal Rule of Civil Procedure 9, a plaintiff must plead fraud with
14 particularity. “Rule 9(b)’s particularity requirement applies to state-law causes of
15 action.” Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003).
16 “Averments of fraud must be accompanied by ‘the who, what, when, where, and
17 how’ of the misconduct charged.” Id. at 1106 (quoting Cooper v. Pickett, 137 F.3d
18 616, 627 (9th Cir.1997)). “[A] plaintiff must set forth more than the neutral facts
19 necessary to identify the transaction. The plaintiff must set forth what is false or
20 misleading about a statement, and why it is false.” Id. at 1106 (quoting Decker v.
21 GlenFed, Inc. (In re GlenFed, Inc. Sec. Litig.), 42 F.3d 1541, 1548 (9th Cir.1994)).
22 “While statements of the time, place and nature of the alleged fraudulent activities
23 are sufficient, mere conclusory allegations of fraud” are not. Moore v. Kayport
24 Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989).

25 Plaintiff has presented only conclusory allegations of fraud in the complaint.
26 (E.g., Compl. ¶13.) Plaintiff has failed to allege with specificity any fraudulent
27 statements that were made by Defendants at any time. These allegations fall well
28 short of the pleading requirements of Rule 9(b).

1 Based on the pleadings currently before the Court, the Court concludes that
2 Plaintiff has failed to make the required minimum showing with regard to the state
3 law claims included in the complaint. Accordingly the Court dismisses without
4 prejudice Plaintiffs' state law claims.

5 **II. Defendant Aurora's Motion to Dismiss Pursuant to Fed. R. Civ. P.**
6 **12(b)(5)**

7 Federal Rules of Civil Procedure 4(e)(1) and (h)(1)(A) allow a plaintiff filing
8 in this Court to serve a corporation pursuant to the California state law governing
9 service. Pursuant to California Code of Civil Procedure Section 415.40, a plaintiff
10 may serve a person outside the state by mailing the summons "to the person to be
11 served" by first-class mail, postage prepaid, and return receipt requested. Section
12 416.10(b) provides a corporation is served by delivering a copy of the summons and
13 complaint to "a person" holding a specific list of corporate offices, including vice
14 president.

15 A court's jurisdiction over a defendant is acquired through proper service of
16 process. SEC v. Ross, 504 F.3d 1130, 1138 (9th Cir. 2008); see also Travelers Cas.
17 & Sur. Co. of Am. v. Brenneke, 551 F.3d 1132, 1135 (9th Cir. 2009) ("A federal
18 court is without personal jurisdiction over a defendant unless the defendant has been
19 served in accordance with Fed. R. Civ. P. 4.") (quoting Benny v. Pipes, 799 F.2d
20 489, 492 (9th Cir. 1986).

21 A defendant may bring a motion to dismiss based on insufficient service of
22 process. Fed. R. Civ. P. 12(b)(5). When a defendant challenges the sufficiency of
23 service of process, the plaintiff bears the burden of establishing valid service.
24 Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004) ("Once service is
25 challenged, plaintiffs bear the burden of establishing that service was valid under
26 Rule 4.").

27 Defendant Aurora argues that Plaintiff never properly served the complaint.
28 Plaintiff addressed the summons and complaint to two former vice presidents, who

1 no longer worked for Aurora at the time Plaintiff attempted to perfect service on
2 Aurora. (See Doc. No. 12-2 (“McCann Decl.”) ¶¶7-8.) These individuals were no
3 longer agents of Aurora at the time of attempted service, and therefore could not act
4 as agents of Aurora and accept process. Alan, Sean & Koule, Inc. v. SV/CORSTA
5 V, 286 F. Supp. 2d 1367, 1375 (S.D. Ga. 2003) (“One event that conveys notice of
6 the termination of apparent authority to a third party is the termination of the agent's
7 employment”). Nor does Plaintiff make any showing that the named individuals,
8 Carla Wise and Robert Simpson, actually received the summons and complaint.

9 “Since a corporation can only be served through a person, the person to be
10 served is always different from the corporation.” Dill v. Berquist Constr. Co., 24
11 Cal. App. 4th 1426, 1435-36 (1994). Although Plaintiff also addressed the summons
12 and complaint to “Aurora Loan Services, LLC” a “summons addressed only to a
13 corporate entity, not directed by name or by title to an individual listed in § 416.10
14 and not actually received by such person,” will not satisfy the substantial compliance
15 requirement for service of process. Watts v. Enhanced Recovery Corp., 10-CV-
16 02606-LHK, 2010 WL 3448508 (N.D. Cal. Sept. 1, 2010).

17 Although plaintiff’s summons and complaint were accepted through Aurora’s
18 mail intake procedures, the individual who physically signed the return receipt for
19 this piece of mail was not authorized to accept service of process on behalf of
20 Aurora. (See McCann Decl. ¶6.) “[T]he fact that a person is authorized to receive
21 mail on behalf of a corporation and to sign receipts acknowledging the delivery of
22 that mail does not mean that the same person is authorized by the corporation to
23 accept service of process.” Dill, 24 Cal. App. 4th at 1438.

24 Plaintiff has failed to demonstrate proper service on Defendant Aurora as
25 required by California Code of Civil Procedure Section 416.10(b). Therefore, the
26 Court grants Defendant Aurora’s motion to dismiss pursuant to Federal Rule of Civil
27 Procedure 12(b)(5). However, Plaintiff will have an opportunity to file a second
28 amended complaint and re-serve it to Defendant Aurora within 30 days.

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For the reasons above, the Court **GRANTS** Defendants Aurora and TFLG’s motions to dismiss the complaint without prejudice. The Court grants Plaintiff 30 days from the date of this order to amend or cure the deficiencies—if she can—in a first amended complaint with respect to Defendant TFLG and to then effect proper service of the first amended complaint to Defendant Aurora.

IT IS SO ORDERED.

DATED: August 29, 2013

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT